proceedings, remains to be seen. However, I must state that that decision has already been cited before me in support of various propositions, including that of saying that a Judge, after making an order for sale is not *functus officio*; and that a date for the public auction ordered in pursuance of the order for sale made by the Court in the foreclosure proceedings, ought not to be made until after it was certain that the chargor was not intending to challenge the order for sale in a subsequent action.

As none of these propositions are directly relevant for the purposes of the present application, I express no views on the decision. But, I may add, that the decision has far-reaching consequences, and lawyers acting for banks and other financial institutions, may well be advised to bear this decision in mind when advising their clients as to whether and order for sale ought to be sought on default by the chargee. Certainly, the decision appears to go much further then what was decided in the earlier cases. As already stated, the earlier cases seem to indicate that the chargor who is dissatisfied with the decision of the Court in making an order for sale, may either appeal against the decision of the Court in ordering the order for sale, or he may challenge the sale to a third party pursuant to the order for sale on the ground that the sale was improperly conducted, as was the situation in *M & J Frosen Food Sdn. Bhd.*

It is hoped that the Supreme Court in the very near future will have the opportunity to reconsider these issues and cases and restate the principles applicable, so that the present confusion and uncertainties in the law would be overcome.

Conclusion:

Practical difficulties may arise as a consequence of the view I have taken of a sale by way of private treaty of a charged property after an order for sale has been granted by the Courts. But that appears to be the law, and until the law is changed, I am bound by the law. Courts do not have the power to change the law to suit practical inconveniences which may arise to certain parties. That is the duty of Parliament.

Y.A.M. TENGKU ALI IBNI ALMARHUM SULTAN ISMAIL

v.

KERAJAAN NEGERI TERENGGANU DARUL IMAN

HIGH COURT, KUALA TERENGGANU
DATO' HAJI IDRIS BIN YUSOFF J.
[CIVIL SUIT NO. 21-52-1992]
5 DECEMBER 1993

JURISDICTION: Application by plaintiff for a declaration that he was the Sultan of Terengganu from 1942 to 1945 - Whether matters complained of justiciable - Whether Court has jurisdiction to entertain action - Whether Court forum non conveniens.

PRACTICE & PROCEDURE: Rules of the High Court 1980 - O. 15 r. 16 - Power of Court to make binding declarations of right - Whether provision thereof applicable - Filing of unconditional appearance to claim - Effect - Whether tantamount to submission to jurisdiction of Court.

PRACTICE & PROCEDURE: Unpleaded issues - Defence of limitation under Public Authorities Protection Act 1948 - Defence not expressly raised in pleading - Whether defence maintainable - Whether defence of limitation by itself sufficient ground for invoking O. 18 r. 19 RHC.

The plaintiff applied for a declaration that he was the Sultan of the State of Terengganu for the period 26 September 1942 to 5 November 1945, for payment of a life allowance of RM1500 a month by the defendant with effect from November 1945 and for provision of a residence befitting his station of life as provided for in Chapter 18, Laws of the Constitution of the State of Terengganu, 1911. The defendant resisted the application and subsequently entered an unconditional appearance to the suit. The defendant later applied under O. 18 r. 19(1)(a) Rules of the High Court, 1980 by way of summons-in-chambers for the striking out the claim on the grounds:

(1) that the claim disclosed no cause of action;
(2) that the matters complained of were not justiciable thereby giving the Court no jurisdiction to entertain the action;
(3) that the action was time barred by virtue of the Limitation Act 1953 and the Public Authorities Protection Act 1948; and
(4) that the Court in this case was forum non conveniens and that the matter, rightly

and properly, ought to be dealt with by the Jumaah Pangkuan Negeri in accordance with the provisions of the Laws of the Constitution of Terengganu.

Held:

[1] The law is clear that if the defendant intends to challenge the jurisdiction of the Court he must enter a conditional appearance as opposed to an unconditional one which would be followed by some form of application to have the suit set aside. The method adopted by the defendant in this case tantamounts to a submission to the jurisdiction of the Court.

[2] Although under O. 18 r. 19 the application for striking out pleading can be made at any stage of the proceedings, such application must be made promptly. The application in the instant case, which was made some seven months after the date of the statement of defence, was not promptly made.

[3] The plaintiff is not claiming that he is the rightful Ruler of the State of Terengganu and nor is he claiming for his reinstatement to the throne. What the plaintiff applied for is a declaration that he was the Ruler from 1942 to 1945 and such declaration can only be granted by the High Court or the Supreme Court. This being the case it is not tenable to contend that the plaintiff's claim comes within the role of the Jumaah Pangkuan Negeri as embodied in Art. 6 of the Laws of the Constitution of Terengganu. The plaintiff's claim is therefore jucticiable and there is no legal impediment for the Court to adjudicate upon the claim.

[4] The Kerajaan Negeri Terengganu Darul Iman has been correctly cited as the defendant since the claim is for a life allowance "from the revenues of the country", which revenues go to the Consolidated Fund of the defendant.

[5] The power of the Court to make a binding declaration of right under O. 15 r. 16 Rules of the High Court 1980 is a discretionary one. As the matter in issue in this case is justiciable, and as the declaration sought is not in respect of matters in which exclusive jurisdiction is given to another tribunal, the power to make a binding declaration of right is exercisable by the Court.

[6] Even though the Public Authorities Act 1948 is silent on the need to plead the Act as a defence, nevertheless, if a party intends to rely upon any section of the Act as a defence, the Act or the section in question must be specially pleaded. The point of law on limitation, as is clearly required by O. 18 r. 18(1) RHC, must always be raised by an express plea. The defendant has not pleaded the defence of limitation under this Act and the Court cannot therefore take cognisance of such defence and it follows that such defence is not available to the defendant. If the defendant is mindful of pursuing the defence of limitation it is at liberty to do so within the framework of the Limitation Act 1953.

[7] On the issue of limitation under the Limitation Act 1953, it is settled that a statute of limitation merely bars the remedy of the plaintiff but not his cause of action. Since a limitation defence when pleaded might be subject to exceptions, a defendant could never apply under O. 18 r. 19 of RHC to strike out a claim against him as disclosing no reasonable cause of action merely because he might have a good limitation defence.

[Defendant's application dismissed].

Cases referred to:

Dato' Menteri Osman bin Baginda & Anor. v. Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29 (FC) ***(dist)***

Mohammed Habibullah bin Mohamood v. Faridah bt Abu Talib [1992] 2 MLJ 293 (SC) ***(dist)***

Yew Bon Tew & Anor. v. Kenderaan Bas Mara [1983] 1 MLJ 1 (P.C.) ***(refd)***

Lee Ah Chor v. Southern Bank Bhd. [1991] 1 SCR 285 ***(refd)***

Chartered Bank v. Yong Chan [1974] 1 MLJ 157 ***(foll)***

Ronex Properties Ltd. v. John Laing Contruction Ltd. & Ors. [1982] 3 AII ER 961 ***(foll)***

Yeo Chu Hui v. Lim Cheng Jin (f) & Anor. [1993] 1 AMR 18 745 ***(foll)***

Legislation referred to:

Limitation Act 1953, ss. 4, 6

Public Authorities Protection Act 1948, s. 2

Rules of the High Court 1980, O. 15 r. 16, O. 18 rr. 8(1), 19(i)(a)

Rules of the Supreme Court, O. 18 r. 19

Other sources referred to:

Halsbury's Law of England, 4th Edn. Vol. 37 para 252

Mallal Supreme Court Practice, 2nd Edn., paras 18/19/1-2

For the plaintiff - Mura Raju (Dato Sivasubramaniam with him); M/s. Mura Raju & Co.

For the defendant - Sri Ram (Idrus bin Harun with him); M/s. Sri Ram & Co.

JUDGMENT

Haji Idris bin Yusoff J:

The defendant, Kerajaan Negeri Terengganu Darul Iman, by a summons-in-chambers applies to the Court for an order to strike out the claim of the plaintiff seeking primarily for a declaration that he was the Sultan of the State of Terengganu for a period 26 September 1942 to 5 November 1945. The application is made pursuant to O. 18 r. 19(i)(a) of the Rules of the High Court 1980.

The grounds on which the defendant relies to strike out the plaintiff's claim are that the matters complained of are not justiciable and the Court in any event has no jurisdiction to entertain the action and alternatively the plaintiff is not entitled to the relief claimed. And additionally the defendant contends that the plaintiff's claim is barred by Limitation Act 1953, lastly the claim does not disclose a reasonable cause of action against the defendant.

A look at the plaintiff's statement of claim shows that what he is asking for is a declaration that he was the Sultan of the State of Terengganu during the period aforesaid, and as consequence thereof he be paid a life allowance of RM1,500 a month to take effect from November 1945 with whatever arrears due to him together with a suitable residence befitting his station of life as an ex-ruler as provided for under the provisions of Chapter 18 of the Laws of the Constitution of the State Terengganu of 1911.

On an application to strike out the pleading under O. 18 r. 19, it has often been said that since the exercise of such power is a drastic one, it follows that whenever triable issues of fact and law have been raised the summary jurisdiction of the Court under this rule or under its inherent jurisdiction should not be invoked. It is only in plain and obvious cases that recourse should be had to the summary procedure under this rule, i.e. in cases where the statement of claim really discloses no cause of action - see **Mallal Supreme Court Practice,** 2nd Edn., paras 18/19/1-2.

It is indeed the law and so is submitted by the defendant's Counsel that in an application relying upon O. 18 r. 19 (i)(a), the Court has to confine its scrutiny to the pleading sought to be struck out and not to undertake the scrutiny of the evidence.

Counsel for the defendant make a rather interesting submission on the question of jurisdiction of the Court and the justiciability of a complaint contained in the statement of claim which question he says can be raised at any time even on appeal though not taken before the trial Court. He maintains that if there is another body established by law which would be more competent to deal with such matter, the Court ought to refuse whatever remedies sought for on ground of *forum non conveniens* - not that the Court would declare that it has no jurisdiction but that it merely refuses to exercise it as it is felt that the claim would suitably be dealt with elsewhere. A number of authorities are relied upon by him and to quote a few are *Dato' Menteri Osman bin Baginda & Anor. v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (F.C.) and *Mohamed Habibullah bin Mahmood v. Faridah bt Abu Talib* [1992] 2 MLJ 293 (SC). It is to be noted from the foregoing that there is a slight shift in the stance now adopted by the defendant when compared to the application, wherein it is contended that the Court has **no jurisdiction** to deal with the matter of this nature.

The plaintiff on the other hand argues that by filing an unconditional appearance to the suit the defendant is precluded from raising this ground anymore. I must say with respect that I entirely agree with the plaintiff's contention as the law on this point is well settled. A host of authorities show that if the defendant is mindful of challenging the jurisdiction of the Court he is to enter a conditional appearance as opposed to an unconditional one which would be followed the suit set aside. The method adopted by the defendant in this case clearly tantamounts to a submission to the jurisdiction of the Court.

Although under O. 18 r. 19 it states that the application for striking out the pleadings can be made at any stage of the proceedings but the Court would still want that such application be made promptly. Looking at the application it was dated 7 January 1993 which can be regarded as quite a lapse of time considering the statement of defence was dated 2 June 1992. This was followed by defendant's application on 17 July 1992 to have the suit transferred from the High Court at Kuantan to this Court. A summons for direction was taken out by the plaintiff, and was followed by an application by the defendant to amend the defence. In the event it is urged upon this Court that such a

delay should be construed as being detrimental to the defendant's present application since the defendant at all time had access to the services of its Legal Adviser who should have been aware of the alleged irregularity at the very outset.

Turning to the question of justiciability, what the plaintiff says he is not claiming that he, presently, is the rightful ruler or that he should be reinstated. If that be his claim I tend to agree that it may come within the role of Jumaah Pangkuan Negeri as embodied in Article 6 of the Laws of Constitution of Terengganu (2nd part) and the submissions advanced by the defendant would be tenable. As submitted by the plaintiff the matter in issue is for a declaration that he, the plaintiff **was** the ruler of the State of Terengganu from 24 September 1942 to 5 November 1945 and that only the High Court or the Supreme Court can grant such a declaration. And further, if the declaration is granted in the plaintiff's favour, his further and main claim is for whatever entitlements that may be due to him under Chapter 18 of the 1911 Constitution. Such matters are not stipulated to be within the powers of Jumaah Pangkuan Negeri. For myself I say that the submission is in line with the law and that the two authorities relied upon by the defendant are, to say the least, distinguishable and not for application to the instant case and on this ground I see no legal impediments for this Court to adjudicate upon the claims of the plaintiff. The Kerajaan Negeri Terengganu Darul Iman has been correctly cited as the defendant since the claim is for a life allowance "from the revenues of the country" and which revenues go to the Consolidated Fund of the defendant.

The defendant also claims that the plaintiff has not established any cause of action even assuming that all the matters set out in the statement of claim are accurate. The complaints are not justiciable and the Court should not take cognisance of the suit.

On behalf of the plaintiff it is argued that the effect of O. 15 r. 16 of the Rules of the High Court l980 is that an action for a declaration lies even though the plaintiff cannot establish a cause of action in the strict sense of the term, as the intention is to empower the Court to make binding declarations of right, whether there is a cause of action or not - see **Halsbury's Law of England,** 4th Edn., Vol. 37 para 252.

The power to make a binding declaration of right is a dicretionary one. And the power to make a declaratory judgment "is confined to matters which are justiciable in the Courts and the binding declaration which it can make must be a declaration as to legal or equitable rights and not moral, social, or political matters" - see **The Supreme Court Practice 1985** (The White Book). But the Court has no jurisdiction to make a declaration in a matter in which exclusive jurisdiction is given to another tribunal. However as I have already held that the plaintiff's claims are justiciable. I therefore rule that the defendant's contention on this point fails.

Finally there is the question of limitation which according to defendant places a bar to the plaintiff's claim. According to the statement of claim the complaints relate to event that transpired in 1945 whereas the writ in this action was only filed in 1992. Relying on s. 2 of the Public Authorities Protection Act 1948 the defendant says that the action should have been brought within 12 months of the accrual of the cause of action {though the period of 12 months has been extended to 36 months effective 13 June 1974, the extension has no retrospective effect - *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] MLJ 1 (PC). It is further submitted by the defendant that although the limitation under the the Public Authorities Protection Act 1948 has not been pleaded in the amended defence, there is no prohibition against the defendant raising this issue upon its summons, unlike s. 4 of Limitation Act 1953 which makes it mandatory for such defence to be expressly pleaded.

Even though the Public Authorities Protection Act 1948 is silent on the need to plead the Act as a defence, to my mind, if a party intends to rely upon any section of the Act as a defence the Act or the section of the Act must be specially pleaded. The point of law on limitation must always be raised by an express plea. This is so required under O. 18 r. 8(1) of the Rules of the High Court 1980. The said rule 8(1) says:

> 8(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or...

It is noted from the amended statement of defence that the question of limitation was in fact raised, wherein stated that the claim of the plaintiff was not maintainable, since it was filed not within the period of limitation as allowed by s. 6 of the Limitation Act 1953. Again it is observed in the instant application, one of the grounds relied upon by the defendant is that the plaintiff's claim is statute barred under the Limitation Act 1953. It is only in the submissions that for the first time the question of limitation under s. 2 of the Public Authorities Protection Act 1948 is invoked. In the event, ought the Court to take cognisance of this defence when the provisions of these two laws are materially different though both deal with the issue of limitation - more especially when the defence of limitation under the Limitation Act 1953, in certain respect, is subject to exceptions, for instance a fresh accrual of right of action, existence of fraud or mistake which inevitably would require consideration of certain evidence and which evidence is unfortunately not admissible in an application of the nature relied upon by the defendant. On my part I would say that if the defendant is mindful of pursuing the defence of limitation it is at liberty to do so within the framework of the Limitation Act 1953.

On the question of issues which are not pleaded, I think I need only refer to Supreme Court's decision in *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 SCR 285 which after considering a number of authorities concluded at p. 291:

> It does not seem necessary for us to emphasize and repeat the importance of pleadings in a civil suit, castigating observations of which had been made from time to time in many cases in our Courts. It is only a question of whether Counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that-they do so at their peril. Recently lapses in the strict compliance with the rules of pleadings appear to occur in our Courts with marked frequency and we do not see how such lapses in the Courts should be tolerated at the expense of the clients.

The judgment of Raja Azlan Shah (FJ as he then was) in *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 was also referred wherein His Lordship said at page 159:

> In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings a pedantry or mere formalism.

In the circumstances and on the authorities, I hold that the defence under the Public Authorities Protection Act at least at this juncture, is not available to the defendant.

Adverting to the question of limitation, under the Limitation Act 1953, the English Court of Appeal held in *Ronex Properties Ltd. v. John Laing Construction Ltd. & Ors.* [1982] 3 All ER 961 that "since statutes of limitations merely barred a plaintiffs's remedy and not his cause of action, and since a limitation defence when pleaded might be subject to exceptions, a defendant could never apply under RSC O. 18 r. 19 to strike out a claim against him as disclosing no reasonable cause of action merely because he might have a good limitation defence. This decision found favour with Abdul Malek J. in *Yeo Chu Hui v. Lim Cheng Jin (f) & Anor.* [1993] 1 AMR 18 745 when dealing with Limitation Act 1953 and I see no reason to disagree with him.

Accordingly I hold that the claims of the plaintiff are justiciable and are within jurisdiction of the Court to adjudicate. I therefore dismiss the defendant's application with costs.